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IN THE
COURT OF APPEALS OF INDIANA

TED ITIN,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 93A02-0608-EX-709
	)	
FERRANTELLA CONSTRUCTION,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE INDIANA WORKER'S COMPENSATION BOARD
The Honorable Linda Hamilton, Chairman
Cause No. C-161562

March 20, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Ted Itin appeals a decision of the Worker's Compensation Board of Indiana (the Review Board) to deny Itin's Application for Adjustment of Claim in which he requested that his former employer, Ferrantella Construction (the Employer), provide additional medical treatment and physical therapy for injuries allegedly received while working for the Employer. Itin presents the following restated issue for review: Did the single hearing member err in permitting the Employer to introduce into evidence a surveillance videodisk?

We affirm.

The facts favorable to the Review Board's decision are that Itin began working as a carpenter for the Employer in September 2001. Between 9:00 and 9:30 a.m. on September 8, 2001, Itin reported to his supervisor that he had suffered a back injury. Itin refused the Employer's offer of medical care and continued to work for the remainder of the day. Itin completed that week's work and worked more than fifty-seven hours the next week, but was laid off the following week because of his carpentry skills. Thereafter, Itin worked for United Anco in November and December of 2001. In February 2002, Itin worked at a Lowe's store building metal shelves.

Itin did not seek treatment for back pain until February 2002, when he woke up at home with back pain. Itin informed the Employer about his pain and the Employer directed him to consult with a Dr. Guthrie. Dr. Guthrie examined Itin and determined that he had a lumbar sacral muscle spasm and cleared him to return to work with no limitations. From that point in time, Itin visited several doctors, including Dr. Donald

Kucharzyk. On February 15, 2002, Itin reported to Dr. Kucharzyk that he had "an acute exacerbation" of the September 8, 2001 injury he suffered while working for the Employer. *Appellee's Appendix* at 14. Itin continued treatment with Dr. Kucharzyk until approximately October 1, 2002, when he suspended treatments for more than one year. Itin resumed treatments with Dr. Kucharzyk on October 30, 2003. Dr. Kucharzyk eventually recommended that Itin have back surgery to treat his symptoms. Acuity Insurance, the Employer's insurer, directed Itin to get a second opinion, which he obtained on April 22, 2004, following an examination by Dr. Kimjot Singh. Dr. Singh concluded, "His physical exam is out of proportion to his symptomatology. I do not feel there is causal relation between his work injury and his current problem. I think it was largely pre-existing." *Transcript* at 180.

On May 17, 2002, Itin filed an application for adjustment of claim with the Indiana Department of Workforce Development. Itin requested an award of either temporary total disability or temporary partial disability from September 8, 2001 until the time of the hearing, as well as funds for medical treatment necessitated by his injured back. On October 28, 2004, a hearing was conducted by hearing member Susan Severtson and the parties thereafter submitted proposed findings of fact and conclusions of law. On January 23, 2006, Itin's application was denied in a decision that was accompanied by findings of fact and conclusions of law. Itin appealed that ruling to the Review Board, which heard the matter on June 26, 2006. On July 19, 2006, the Review Board adopted the decision of the single hearing member as well as the findings and

conclusions accompanying that decision. Itin appeals from that ruling. Additional facts will be provided where relevant.

Ind. Code Ann. § 22-3-4-8(b) (West, PREMISE through 2006 Second Regular Session) provides, an "award by the full board shall be conclusive and binding as to all questions of the fact, but either party ... may ... appeal to the court of appeals for errors of law under the same terms and conditions as govern appeals in ordinary civil actions." Pursuant to this, we apply a deferential standard of review under which we are "bound by the [Review] Board's findings of fact and may not disturb its determination unless the evidence is undisputed and leads undeniably to a contrary conclusion." *LaGarda Sec. v. Lawalin*, 812 N.E.2d 830, 833 (Ind. Ct. App. 2004) (quoting *Greenberg News Network v. Frederick*, 793 N.E.2d 311, 314 (Ind. Ct. App. 2003)).

Itin contends the single hearing member erred in permitting the Employer to introduce into evidence a surveillance videodisk. A brief review is in order regarding the background facts relating to that videodisk. At a February 2004 deposition in this matter, Itin claimed "he can't work, hasn't worked in years." *Appellant's Appendix* at 19. After that deposition, Acuity hired Infomax Investigations, Inc., a private investigator, which conducted video surveillance of Itin's activities on September 30, 2004. In that video, Itin is seen, among other things, driving a truck, operating a forklift, lifting objects, and carrying them from place to place. Of course, Itin was not aware at the time that his activities were being recorded.

On October 26, 2004, Acuity sent the videodisk to Itin, who received it the next day, October 27. That was one day before the hearing was to be held on Itin's application. At the outset of the hearing the next day, the Employer indicated it would seek to admit the videodisk into evidence. Itin objected on multiple grounds, including: (1) the disk was not supplied until the day before trial, in arguable violation of an open discovery order; (2) the disk constituted inadmissible hearsay because "[t]hey do not have anybody to lay the proper foundation for admission into evidence", *id.* at 17; and (3) the videodisk was irrelevant. Itin's arguments on appeal are essentially the same as those that were made in the proceedings below, as set out previously. The Employer counters that the videodisk was properly admitted, but that in any event, the Review Board expressly deleted the findings related to the disk and therefore this does not constitute a reversible issue. We agree with the Employer as to the latter assertion.

The first decision rendered in favor of the Employer adopted *in toto* the proposed findings and conclusions submitted by the Employer. The Review Board's decision, however, reflected two notable exceptions. The Review Board expressly rejected two of the findings by striking them. The stricken findings stated:

> 35. Defendant placed Plaintiff under video surveillance on September 25 and 30, 2004. Plaintiff is observed pulling and pushing a load onto a forklift, driving a forklift with a large steering wheel, lifting a toolbox with his left hand and walking with shelves on his right shoulder. Plaintiff gives no outward sign of pain or hesitation in his movement.
>
> 36. Plaintiff's testimony as to the extent of his alleged disability is contradicted by the videotape evidence of his activities on September 30, 2004.

Appellee's Appendix at 5. Those two findings of fact were the only ones related to or derived from the disputed videodisk.

We note here that a portion of one conclusion of law also referred to the videodisk. That conclusion of law states: "Although Plaintiff claims he has been essentially disabled since September 8, 2001, his testimony is contradicted by his subsequent work history, *the videotape evidence* and his application for unemployment benefits indicating he is ready for full-time unrestricted work." *Id.* at 6 (emphasis supplied). This conclusion does not alter our view that the acts depicted on the videodisk are of negligible importance to the Review Board's decision. First, the Review Board struck the videodisk, thus permitting the inference that this remaining reference to the videodisk was an oversight on the part of the Review Board. Moreover, this conclusion cites other, independent evidence that refutes Itin's claim of injury and disability. Therefore, we are inclined to view this isolated reference to the videodisk as relatively insignificant.

It is well established in the criminal law context that the erroneous admission of evidence is harmless unless it affects the substantial rights of the parties. *See Greenboam v. State*, 766 N.E.2d 1247 (Ind. Ct. App. 2002), *trans. denied*. "Substantial rights of the parties" in this context is measured by the probable impact of the improper evidence upon the trier of fact. *See id*. Thus, we will not reverse because of the erroneous admission of evidence unless the complaining party demonstrates the evidence impacted the decision. *Strack & Van Til, Inc. v. Carter*, 803 N.E.2d 666 (Ind. Ct. App. 2004). These principles

also apply in civil trials. *See, e.g., Sikora v. Fromm,* 782 N.E.2d 355 (Ind. Ct. App. 2002), *trans denied.*

In this case, the written decision under review – that of the full Review Board – did not incorporate the findings related to the disputed videodisk. In fact, the Review Board's striking of those findings reflects that it did precisely what Itin urges should have been done in the first place, i.e., it expressly disregarded the videodisk in making its determination. Thus, we agree with the Employer that this issue effectively becomes a non-issue. As a result, because Itin suffered no prejudice from the admission of the videodisk at the hearing before the single hearing member, he is not entitled to reversal on that issue. *See Strack & Van Til, Inc. v. Carter,* 803 N.E.2d 666.

To underscore the irrelevance of the videodisk with respect to the Review Board's decision, we note the Review Board's conclusions of law in support of the decision, which state as follows:

> 1. While Plaintiff suffered a back injury while working for Defendant on September 8, 2001, the extent of the injury was minor. Plaintiff did not require immediate medical attention. He continued to work the entire day for Defendant and almost sixty (60) hours the following week.
>
> 2. After leaving the employment of Defendant, Plaintiff continued to work heavy carpentry jobs until February, 2002, when he suffered an exacerbation.
>
> 3. Plaintiff did not seek medical attention until after this second event in February, 2002, some five (5) months after his muscle pull in September, 2001.

> 4. Although Plaintiff claims he has been essentially disabled since September 8, 2001, his testimony is contradicted by his subsequent work history, the videotape evidence and his application of unemployment benefits indicating he is ready for full-time unrestricted work.
>
> 5. Plaintiff's evidence is insufficient to show that his current back condition is causally related to his injury on September 8, 2001.
>
> 6. Plaintiff's injury on September 8, 2001, resolved without treatment, allowing him to return to work for Defendant and others until February 22, 2002, when he sought medical treatment for an unrelated acute exacerbating event.

Appellee's Appendix at 5-6. We observe that, with the exception of the videodisk, Itin has not challenged the evidence supporting the Review Board's conclusions that (1) he did not suffer a disabling back injury while working for the Employer, and (2) his current back problems are not related to any injury Itin may have suffered while working for the Employer on September 8, 2001. The unchallenged evidence included Itin's employment history, which showed periods of normal employment following the allegedly disabling injury, unemployment applications filed by Itin post-September 8, 2001, in which he represented that he was capable of unrestricted employment, and evidence that Itin declined medical treatment at the time he was allegedly injured and in fact did not seek medical treatment until more than five months later, long after he had ceased employment with the Employer and begun working for someone else. Entirely independent of the activities depicted on the videodisk, the foregoing evidence supports the Review Board's decision.

Judgment affirmed.

RILEY, J., and KIRSCH, J., concur.